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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 80

MARK E. SCHLUDE AND MARZALIE SCHLUDE

v.

COMMISSIONER OF INTERNAL REVENUE

PETITIONERS' REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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May 22, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 793

MARK E. SCHLUDE AND MARZALIE SCHLUDE

v.

COMMISSIONER OF INTERNAL REVENUE

PETITIONERS' REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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(1) The Government now states that it does not contend that an accrual basis taxpayer must accrue income whenever he signs a contract to perform services (Brief p. 11). However, it states the taxpayers in the case at bar must accrue, on the date of signing, the face value of contracts. The argument, without citation of authority, is that in the contracts here involved the promises to pay and the promises to perform are not dependent. This argument is contrary to firmly estab-

lished law. *Williston on Contracts, Revised Edition*, Volume 3, Section 812 states:

> "Despite the fact that the promises of each party in a bilateral contract may not in form be conditional upon performance by the other of his promise the law now recognizes that in substance parties to an ordinary bilateral contract are not interested in a mere exchange of promises but that normally, their real object is to secure an agreed exchange of reciprocal promised performances. The usual situation, then, is one of mutually dependent promises, and the problem of this chapter is what is the effect of the actual or prospective non-performance of the counter-promise upon the duty of the promisor to go forward with performance of his promise."

If the petitioners in this case were, for any reason, unable to perform their promises, it would be a complete defense to any action by them on the student's promises. *Williston on Contracts*, Section 860, says:

> "* * * It may be assumed that if the promises, though more than one on each side, constitute a single contract, there is a general dependency between all the promises on one side and all the promises on the other, that is, all the promised performances on both sides must be regarded as the agreed exchange for each other. Consequently a failure as to a material portion on one side will excuse continued performance on the other."

(2) At pages 10-11 the Government's brief says:

> "Since the AAA case in fact involved only actual cash receipts, the Court cannot be said to have passed on this precise question in that case." (Citing *American Automobile Association* v. *United States*, 367 U.S. 687.)

In the petition for certiorari No. 629, October Term 1960, 367 U.S. 911 and 363 U.S. 873, the Government stated as its first reason for granting the writ that the decision of the Eighth Circuit was in conflict with the Court of Claims decision in the AAA case. In granting certiorari, and remanding the case without hearing, it is assumed that the Court accepted the Government's statement as to conflict with AAA. The Government now admits that the Court in AAA did not pass on the precise question here involved. It is also of interest to note that in its petition for certiorari seeking review of the prior decision of the Court below the Government contended that the problem presented by this case "is of substantial and continuing importance, both to the Government and to taxpayers." (p. 8) The Government now, however, urges that the question is not "of widespread importance" (p. 13).

(3) The Government states at page 8 that petitioners' experience shows a large proportion of the lessons contracted for are never taken, with the result that petitioners' actual performance under any individual contract was uncertain. The brief fails to state that a large proportion of the contract price was never paid or received (R. 166). In other words, the Government's argument is that when a student breached the contract by failing to pay, or failing to take the lessons within the prescribed time, the studio's liability of performance became uncertain. The situation that arises upon a breach of contract by the student is not a fair criterion to conclude that petitioners' obligation to perform under the contracts is uncertain and contingent.

CONCLUSION

The rule of *United States* v. *Anderson* (1926) 269 U.S. 422 sets forth the principle of accrual accounting for all purposes including tax purposes. Since that decision the matching of income against the expenses incurred in earning that income has been universally accepted as the correct method of computing income. Deviation from that method, as in the case at bar, can only result in uncertainty and litigation. This Court should grant the writ and reiterate the rule of *Anderson*.

Respectfully submitted,

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